Bosk Paint and Sandblast Co. *and* Daniel Lynn McCorkle. Case 9-CA-16885

1 July 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 28 September 1982 Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In adopting the Administrative Law Judge's conclusion that Respondent did not violate Sec. 8(a)(4) of the Act by refusing to hire Daniel McCorkle in March 1981, we find that the General Counsel has failed to establish a *prima facie* case that such refusal was motivated by McCorkle's testimony in an unrelated Board proceeding in January 1977. Accordingly, we find it unnecessary to pass upon the Administrative Law Judge's finding that any "inference" of such motivation was effectively rebutted.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: A hearing in the above-captioned matter was held on July 29, 1982, in Chillicothe, Ohio, on the issues raised by a complaint issued by the Regional Director for Region 9 of National Labor Relations Board, on July 30, 1981, and Respondent's (Bosk Paint and Sandblast Co.) timely answer.

At issue is whether, as the General Counsel alleges, commencing in January 1981, and continuing thereafter, Respondent, in violation of Section 8(a)(1), (3), and (4) of the National Labor Relations Act, refused to hire Daniel Lynn McCorkle, the Charging Party herein, because (a) on or about January 12, 1977, McCorkle gave testimony in a Board unfair labor practice proceeding in Case 9-CA-10655; or (b) because he joined, supported, or assisted Local No. 605 and Local No. 1275, Brotherhood of Painters and Allied Trades, both being labor organizations, and because McCorkle engaged in other concerted activities for the purpose of mutual aid or protection.[1]

At the hearing, the parties appeared by counsel and had the opportunity to call, examine, and cross-examine witnesses, to present oral and written evidence, and to argue orally on the record. At the conclusion of the hearing, the parties waived oral argument and elected to file post-hearing briefs. Thereafter, the General Counsel and Respondent filed timely briefs which have been duly considered.

Upon the entire record, including the briefs, and upon my observation of the witnesses as they testified, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that at all material times Bosk Paint and Sandblast Co., Respondent, has been and is a Michigan corporation with a principal office in Escanaba, Michigan, where it is engaged in the business of painting and sandblasting at various locations within the several States of the United States including its jobsite at the Mead Corporation in Chillicothe, Ohio. During the 12-month period preceding issuance of complaint, a representative period of its business, Respondent, in the course of its business operations, purchased and received at its Escanaba, Michigan, place of business products and goods valued in excess of $50,000 directly from points outside the State of Michigan. Respondent concedes, and I find, that at all material times it has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LOCAL NO. 605 AND LOCAL NO. 1275 AS LABOR ORGANIZATIONS

The complaint alleges, Respondent admits, and I find that at all material times until January 1980 Painters Local No. 605, affiliated with International Brotherhood of Painters and Allied Trades, herein called Local No. 605, Chillicothe, Ohio, was a labor organization within the meaning of Section 2(5) of the Act; and that at all material times Local Union No. 1275, Brotherhood of Painters and Allied Trades of Columbus, Ohio, affiliated with International Brotherhood of Painters and Allied Trades, herein called Local No. 1275, is and has been a labor organization within the meaning of Section 2(5) of the Act.

[1] The charge supporting the complaint was filed by McCorkle on May 26, 1981, and a copy thereof served on Respondent by certified mail on May 27, 1981.

III. THE ALLEGED UNFAIR LABOR PRACTICES[2]

A. *Background*

Respondent, headquartered in Escanaba, Michigan, commencing in 1976, was retained by the Mead Paper Corporation to rehabilitate its facility in Chillicothe, Ohio. It is undisputed that except for short periods when Respondent was not active at the Mead Corporation's facility, it remained in Chillicothe, Ohio, working on that project in the period 1976 through the end of December 1980. Thereafter, in or about the beginning of March 1981, Respondent was awarded further work at the Mead Corporation plant and worked there in the period March through June 1981.

In 1976, the Charging Party, Daniel L. McCorkle, was the business representative of Local No. 605 which operated out of Chillicothe. He had been business representative since 1972 and remained in that position until January 1, 1980, when Local No. 605 was merged into Local No. 1275 which operated out of Columbus, Ohio. In the period 1972 through January 1, 1980, McCorkle, as business representative, performed all duties common to that job including the signing and enforcing of collective-bargaining agreements, and, pursuant to requests from employers, the supplying of employees to employers with whom Local No. 605 had collective-bargaining agreements.

The Discharge of Louis Lansing

In 1976, McCorkle, business representative of Local No. 605, was not an employee of Respondent. According to the decision of Administrative Law Judge James M. Fitzpatrick, in *Bosk Paint and Sandblast Co.*, JD-356-77, issued on May 19, 1977,[3] it appears that Respondent hired, among others, Louis Lansing in June 1976 as one of its first employees. Louis Lansing became the Local No. 605 shop steward on the job and Respondent discharged him on June 28, 1976, allegedly for excessive absenteeism. Contrary to this defense and particularly contrary to Respondent's supervisor, Lawrence Chenier's testimony, Administrative Law Judge Fitzpatrick found that Lansing was fired for his protesting Respondent's failure to abide by the terms of the collective-bargaining agreement to which Respondent, at that time, agreed to be verbally bound. The discharge of Louis Lansing resulted in McCorkle calling a strike among Local No. 605's members at the Mead jobsite which strike lasted about a week. As a result of Administrative Law Judge Fitzpatrick's decision, Respondent paid about $7,000 in backpay to Louis Lansing. It is undisputed that among Louis Lansing's chief witnesses, whose testimony was credited over Chenier's contrary testimony, were his brother, Steven Lansing, and Daniel McCorkle.

McCorkle Employed by Respondent

As above-noted, Administrative Law Judge Fitzpatrick's decision issued on May 19, 1977. The official record of that proceeding also shows that by letter dated August 24, 1977, Respondent's requested permission to withdraw its exceptions and, on September 27, 1977, the Board issued an order granting Respondent's request to withdraw its exceptions.

According to Respondent's payroll records (Resp. Exhs. 5 and 6), in late September 1976, in the week ending September 25, 1976, Respondent hired McCorkle to perform the work of an employee doing sandblasting and painting, being paid at the same rate as employees covered by the collective-bargaining agreement. McCorkle performed sandblasting and painting along with other unit employees and there were no complaints with regard to his ability.

Chenier credibly testified without contradiction, however, that by late 1977 McCorkle was often absent from the job on private business such as attending to his automobile and other private affairs. In or about November 23, 1977, McCorkle suffered injury in an automobile accident resulting in a cervical sprain which resulted in his absence from work and caused him to wear a supportive neck device. He thereafter returned to speak with Supervisor Chenier concerning returning to work, and was told to get a physician's statement that he was recovered before he returned to work. McCorkle testified, and Chenier denied, that he returned to the job 2 weeks thereafter, before Christmas, and Chenier told him that there was no work for him and that he would not be put on. I credit Chenier and find that McCorkle did not ask for work at that time. There is no dispute, however, that November 23, 1977, was the last day of McCorkle's employment by Respondent.

McCorkle testified that in January 1978, as Local No. 605's business agent, he discovered that Respondent was unlawfully working at nights and threatened a strike over this condition until it was rectified. He also testified that at that time, and two or three times per week thereafter, upon visiting the jobsite as business agent, in the period 1978 through 1980, he told Supervisor Chenier, Foreman Olsen, and Foreman Gardippi that he was available for and willing to work. Chenier testified, contradicting McCorkle, that McCorkle after November 1977 never appeared for the purpose of working for Respondent, and that, indeed, in early 1978, Chenier discovered first hand that McCorkle was engaged in working as a painter for another painter employer. He testified without contradiction that he therefore believed that McCorkle had quit his employment with Respondent. While Chenier, as above noted, admits telling McCorkle that when McCorkle was ready to return to work he could do so upon production of a physician's certificate, Chenier testified that not only did McCorkle not produce a physician's certificate, but he also never returned for work at all. It was a few weeks thereafter, as Chenier testified, that he discovered McCorkle at a new construction job in Chillicothe where he found him with a paintbrush in his hand doing painting. Chenier also testified that McCorkle did not visit the job two or three

[2] Respondent concedes that its vice president, Robert Bosk, its job superintendent, Lawrence (Larry) Chenier, and its job foreman, Wayne Olsen, are supervisors within the meaning of Sec. 2(11) of the Act and Respondent's agents within the meaning of Sec. 13 of the Act.

[3] I have taken official notice of Administrative Law Judge Fitzpatrick's decision which, on September 27, 1977, became the Board's Order after Respondent, on August 24, 1977, received permission from the Board to withdraw its exceptions to the Decision.

times a week in the period 1978 through 1980. I credit Chenier.

McCorkle testified that, in the period 1976 through 1980, he caused between 50 and 60 work stoppages at the Bosk facility at the Mead Corporation; and that 30 or 40 of these work stoppages occurred after 1977. He testified that these work stoppages or strikes were caused by Respondent hiring nonunion employees and continued until Respondent rid itself of these nonunion employees. Other strikes, according to McCorkle, were caused by Respondent's failure to pay the proper union scale of wages. In particular, McCorkle testified that, in 1978, he discovered Respondent engaged in working at night without telling Local No. 605 or receiving its permission, and he also caused Chenier to remove two nonunion employees from the job. When McCorkle then supplied two replacements for the displaced nonunion employees, McCorkle testified that he told Chenier that he was available, but Chenier told him that Respondent could not use him. I do not credit McCorkle.

Chenier denied that there were any strikes[4] at Respondent's Mead Corporation facility, other than the Louis Lansing strike of 1976, and a strike between August 13 and October 11, 1979, called by McCorkle, over the issue of whether Respondent was properly paying its employees a 50-cent-per-hour increase pursuant to the terms of the 1979 collective-bargaining agreement. There is no dispute that, as a result of this strike, the Union filed a mechanics lien of $100,000 against the job, and Respondent removed all nonunion men from the job and was required to pay the "correct wages" (i.e., the additional 50 cents per hour) from the time of the conclusion of the strike in October 1979 and thereafter.

While I credit McCorkle with regard to the fact that one of the reasons for his causing the 10-week strike August 1979 was Respondent's failure to allegedly pay the proper contract wages, I do not credit McCorkle's further testimony that he was unaware of another element of the strike: that on October 31, 1979, the Regional Director for Region 9 of the National Labor Relations Board issued a complaint, alleging violation of Section 8(b)(1)(B) of the Act in that McCorkle threatened to continue engaging in a strike unless Respondent discharged its foreman, Dave Gardippi. While this charge was withdrawn, it is some evidence of Respondent's animus as of that date.

The other witness called by the General Counsel to corroborate McCorkle's testimony was Calvin Simpson, Local No. 605's shop steward at the Mead Corporation in 1981 and employed as a painter by Respondent commencing April 1978. Simpson in no way corroborated McCorkle's testimony: that, in 1978 through 1980, there were strikes or work stoppages. In view of my observation of the witnesses as they testified, Chenier's denial of the existence of strikes other than the two mentioned above, the failure of the General Counsel to support the evidence of strikes through payroll records (or to otherwise explain why such records were not subpoenaed or produced), and other matters affecting McCorkle's credibility, as above noted, I do not credit McCorkle's testimony that there were any work stoppages or strikes at the Bosk facility at the Mead Corporation in Chillicothe, Ohio, other than the two admitted by Chenier.

As above noted, McCorkle also testified that, on perhaps over 100 occasions (two to three times per week in a 2-year period) in the period 1978 through 1980, he presented himself at Respondent's facility as business representative and notified Chenier and two foremen of his ability and availability to work. He also testified that he presented himself only 30–40 times and then "several" times. Chenier denied any such appearances for that purpose at any time and also denied that McCorkle was at the plant two or three times a week. Neither Foreman Gardippi nor Foreman Olsen was called to testify to corroborate Chenier's denial. On balance, I do not credit McCorkle. In addition, McCorkle's prior sworn statement to the National Labor Relations Board (identified in this record as Resp. Exh. 1 although not placed in evidence) was called to McCorkle's attention and, particularly, as the record shows, a sentence therein which, in substance, reads: "I have not worked as a painter since November 1977." At the hearing, McCorkle testified that his prior statement was incorrect and that it should have read that he had not worked as a painter *for Respondent* since November 1977.

Upon my observation of McCorkle, his explanation, and other circumstances in this case, I conclude that McCorkle is not to be credited in this regard or generally and that the substance of his prior sworn statement and his changes in testimony affect his credibility generally and specifically undermines his testimony that he appeared on many occasions at Respondent's premises offering to work as a painter. Especially in view of his failure to deny Chenier's testimony that Chenier found him working elsewhere as a painter in early 1978 (a few weeks after ceasing to work for Respondent in November 1977), I conclude that McCorkle was indeed working as a painter and that among the reasons that he did not often apply for work (as he testified that he had done on many occasions) at Respondent's place of business was that he was gainfully employed elsewhere as a painter.

McCorkle also testified that, in the period 1978–79, he spoke about employment 30 to 40 times with Foreman Wayne Olsen and perhaps 20 times with Foreman Gardippi. Neither of them gave him employment and neither of them gave a reason, except Olsen, who repeatedly said that McCorkle was a "troublemaker" and that Respondent would not hire him. I do not believe this testimony. There is no dispute that, sometime in the period 1976 through 1980, McCorkle borrowed $100 from

[4] In view of this dispute—concerning the frequency of work stoppages caused by McCorkle—in the period 1976–80, no payroll records were introduced to support—or deny—such occurrences; nor was there an explanation why these payroll records were not introduced, including an explanation that such records did not demonstrate such stoppages. Since the frequency of any such strike allegedly constituted the irritant to Respondent on the basis of which the General Counsel suggests Respondent retaliated and refused to hire (or rehire) McCorkle, these records would appear to be part of the General Counsel's *prima facie* case. Although the General Counsel subpoenaed (and Respondent produced) its payroll records, these other records might show not only the frequency of stoppages, but also the replacement of nonunion painters. In any event, if these alleged 1976–77 strikes occurred before September 25, 1976, they were not sufficiently irritating to prevent Respondent from hiring McCorkle on that date. However, I do not credit McCorkle.

Olsen. McCorkle testified that he never repaid the $100 because Olsen owed him a similar amount. According to Chenier, Olsen continued in his position that McCorkle owed Olsen the $100.

The record also shows that Respondent has continually employed Steven Lansing who, as above noted, gave particular testimony against Respondent in support of his brother's unlawful discharge in 1976, and that Chenier nevertheless insisted upon hiring Steven Lansing in 1981.

The record is not in dispute that McCorkle, sometime before the January 1, 1980, merger of Local No. 605 into Local No. 1275, as Local No. 605 business agent, collected $150 in permit fees and initiation fees from aspiring union members which he failed to turn over to Local No. 605. Thereafter, prior to the merger, Local No. 605 financial secretary, Omer Reisinger, filed internal union charges against McCorkle for his failure to turn the money over to the Union and these charges resulted in a union meeting at which McCorkle, *in absentia*, was stripped of his membership in Local No. 605. It is also undisputed that he paid this $150 to Local No. 1275 after the merger, received a permit from Local No. 1275 to work in its jurisdiction, but never became a member of Local No. 1275.

Lastly, the record shows that, in October 1977, Chenier, after prior warnings, discharged McCorkle for excess absenteeism based on McCorkle's being absent on private business. Chenier credibly testified that McCorkle, from time to time leaving Respondent's jobsite during working hours, never said that he was doing so on union business which reason would have permitted his intermittent disparture from the jobsite during working hours. Thereafter, within a few days of the discharge, at a meeting of representatives of the International union and Respondent's top management, McCorkle was reinstated by Chenier. Chenier's uncontradicted further testimony, however, is that, at the meeting at which McCorkle was reinstated, it was agreed that, if McCorkle continued to miss work, Chenier would have the right to discharge him. Chenier testified that McCorkle's rate of absence between that time in October 1977 and McCorkle's ceasing work of November 23, 1977, was slightly improved.

B. *The Events of March 1981*

Respondent's contract at the Mead Corporation in Chillicothe expired in or about January 1981 and its work ceased. Thereafter, Mead requested Respondent to perform further work in Chillicothe to start in March 1981. Sometime immediately prior to the beginning of March 1981, Chenier telephoned Local No. 1275 Business Representative Leslie Walters in Columbus and told him that he needed manpower for this job. Walters told him to contact Calvin Simpson, the Union's shop steward in the Chillicothe area, to obtain manpower.

Chenier called Simpson around March 2, 1981, and told him that Respondent was returning for work the next day; that he desired Steven Lansing and Billy Baisden to work for Bosk; and that he asked Simpson if they were available. Simpson told him that Lansing and Baisden were available and also said that he was himself available.

Apparently at or about the same time, McCorkle called Simpson and asked whether Respondent was returning to the area and whether there was any work for him. Simpson told McCorkle to speak with Supervisor Chenier but McCorkle said that he had been turned down so many times for work he thought it would not do him any good to speak to Chenier. Simpson told McCorkle that, if Respondent asked for any more men, he would tell Chenier that McCorkle was available.[5]

At any rate, Chenier directed Simpson and the others to report to work on March 3, 1981. At the end of that day, Chenier told Simpson that, since he had only 3 to 4 days to complete the job, he needed more manpower. Simpson told Chenier that McCorkle and Louis Lansing wanted to work on the job. Simpson testified that Chenier smiled and said nothing, but Foreman Wayne Olsen said that there was "no way" that McCorkle would work there, that he was a troublemaker. It is undisputed that, following this conversation, three *new* employees were hired and that two old Bosk employees also showed up on the job. Simpson was unable to testify whether Les Walters, the business agent of Local No. 1275, had sent these new employees down to work on the job. McCorkle was not hired.

Simpson testified that, several times since in or about January 1979, McCorkle applied for employment at the Mead Corporation job. He heard Foreman Olsen say that McCorkle was a troublemaker and Respondent would not put him back on the job.[6] However, in March 1981, Olsen said (with regard to Simpson's telling Chenier that McCorkle was available for work) that not only was McCorkle a "trouble maker" but also that he was lazy, that there was "no way" that McCorkle was going back to work at the Mead job, and that if Chenier put McCorkle back to work Olsen would quit. Simpson testified that Olsen did not specify what he meant by "troublemaker." I credit Simpson in this testimony, but it does not follow, in this case, that it was any McCorkle protected activity, rather than personal animus, that inhered in Olsen's use of the word "troublemaker."

On cross-examination, Simpson testified that, in the period 1980 through 1981, Olsen continually complained that McCorkle owed him $100 and said that McCorkle was a lazy worker and a troublemaker. He also testified, corroborating Reisinger, that in the fall of 1979 there was a union complaint against McCorkle for overcharging the Union; and that he discussed the Reisinger charges against McCorkle with McCorkle in or about late 1979. In this regard, Simpson's testimony contradicts

[5] Although Simpson testified that Chenier called him *after* McCorkle called, it seems to me more probable that Chenier called him *before* McCorkle called for work. If Simpson told McCorkle that he would tell Chenier of McCorkle's availability if Chenier asked for any *more* help, such a Simpson statement to McCorkle would have been made *after*, rather than before, Chenier initially spoke of his desire to employ Lansing and Baisden. Simpson was not sure of the sequence.

[6] This testimony is not credited. Simpson testified that in 1979 he saw McCorkle at the Mead site on one occasion and McCorkle did not seek employment. McCorkle testified that, between his 1977 automobile accident and the end of 1980, he visited the Mead site 30 or 40 times and asked for work. He then said that he had visited the site on "several" occasions and that, in his opinion, 30 or 40 times constituted "several visits." I do not credit McCorkle that he requested employment at Bosk.

McCorkle in that McCorkle said that he knew nothing about the charges.

Chenier not only testified that McCorkle did not seek work at any time subsequent to November 1977, but also credibly testified that on one occasion in July 1979, when Chenier told Calvin Simpson, the shop steward, that Respondent needed more help on the job, Simpson told Chenier that he would get more help but would first contact the business agent, Danny McCorkle. Thereafter, McCorkle showed up at night on the job and, when Chenier asked for two additional men, McCorkle thereafter supplied Mark Miller and his father for work but never said that *he* was available for work or wanted work himself. This was undenied.

With regard to the March 1981 hiring, Chenier testified that he called Simpson with regard to getting men and, within a few hours of Chenier's request, Simpson came back with the names of eight employees who then reported to the job. Respondent's payroll records in evidence (G.C. Exh. 2) demonstrate that Simpson and seven other employees plus Foreman Wayne Olsen worked in the week ending March 7, 1981. This would support Chenier's recollection of the phone conversation with Simpson. Simpson never volunteered, at that time, McCorkle's name as one of the persons ready and willing to work. If Simpson's testimony, *supra*, that McCorkle telephoned him *before* Chenier called is credited then Simpson's failure to include McCorkle's name is inexplicable on this record.

With regard to the conversation alleged by Simpson to have occurred wherein Olsen in the presence of Chenier, Steven Lansing, and himself, spoke about McCorkle being hired and McCorkle being a troublemaker, Chenier denied any such conversation took place; denied that Simpson ever suggested that McCorkle be hired (in that or any other conversation); and in addition denied that Olsen ever said McCorkle was a troublemaker. Chenier testified that there were hard feelings between Olsen and McCorkle over the money which McCorkle owed Olsen; and that Olsen often told Chenier, as Simpson admitted, that Olsen had told Simpson of Olsen's hard feelings against McCorkle. Chenier also testified that Olsen never said that there was "no way" that McCorkle would ever work for Bosk. He testified that Olsen had no authority to hire or fire but admitted the conclusion, over objections, that Olsen had the power to recommend hiring. If a resolution were required, I would credit Simpson over Chenier and conclude that Olsen, *inter alia*, did use the word "troublemaker."

Lastly, Chenier testified that both McCorkle and Steven Lansing were on Respondent's payroll before and after the discharge of Louis Lansing and both before and after both were witnesses against Respondent in the discharge of Louis Lansing.

C. *The Local No. 605 Collective-Bargaining Agreement (1977–80) and Respondent's Hiring Procedures*

Article I (union recognition) of the collective-bargaining agreement, at all times in effect herein commencing 1977 and running through 1980 (the expired 1980 contract contains the same clause regarding hiring procedures and recognition as does the newly executed agreement commencing 1981), provides for the necessity of union membership not more than 7 days after initial employment and "good standing in the union" but expressly provides that:

> The employer shall have entire freedom of selectivity in hiring and may discharge any employee for any cause which he may deem sufficient providing there should be no discrimination on the part of the employer against any employee or an applicant for employment because of his union membership, union activities or because of his nonmembership in any union.

As a General Counsel witness, Business Agent (Local No. 1275) Walters testified that, in addition to the collective-bargaining agreement's requirements with regard to union membership, there was no verbal or written exclusive hiring hall agreement or referral agreement between the parties. He testified that subsequent to the January 1, 1980, merger with Local No. 605, there was a three-way conversation in or about June 1980 between the premerger Local No. 605 business agent, himself, and Chenier regarding contract procedures and hiring and that the only thing that was required of Chenier was that Respondent, prior to hiring, notify the Union when the hiring would take place and who was being hired. The person to do the notification on the part of Respondent was to be Chenier.

Chenier testified that, the contract notwithstanding, in practice he would always call the Local No. 605 business representative for employees, who would then be supplied by the business representative, or he would tell the job steward of his needs and the job steward would tell the business representative. At all times when McCorkle was the Local No. 605 business representative, Chenier said that McCorkle was notified of Respondent's needs and McCorkle supplied the employees. The General Counsel elicited from Chenier, on cross-examination, the fact that, on one occasion, when Chenier hired an employee after notification merely of the shop steward, McCorkle threatened a work stoppage until the employee was removed from the job and that only McCorkle would supply employees.

McCorkle testified at length that all through 1978 and 1979 he threatened Chenier with work stoppages because Chenier *hired nonunion* men and that McCorkle had on occasion found nonunion men on the job.

I credit Chenier insofar as the actual hiring mechanism included the fact that Respondent would hire only the union men, notwithstanding the terms of the collective-bargaining agreement, and would hire only men recommended by the business agent, in this case, McCorkle.

Finally, the record shows, and McCorkle admitted, that on June 26, 1981, he was arrested and charged with the crime of breaking and entering into a store, therein committing the further crime of grand theft. After a trial by jury, he was convicted in Ross County, Ohio (Chillicothe), of these crimes and was sentenced to a 1-year term of which he served 7 months. He testified without contradiction that it was his first offense and that he was

released on special parole because of his outstanding behavior and work.

Discussion and Conclusions

The complaint alleges that Respondent unlawfully refused to hire McCorkle, commencing January 1981, because of his testimony in the January 12, 1977, unfair labor practice hearing (Case 9-CA-10655) and because he engaged in union and other protected concerted activities.

1. With regard to Respondent's alleged unlawful conduct derived from McCorkle's having given testimony at the Board's unfair labor practice proceeding, the record shows that although he and Steve Lansing gave testimony in support of Louis Lansing, which testimony resulted in a result unfavorable to Respondent, McCorkle and Steve Lansing remained on the payroll, even after the Administrative Law Judge issued his decision. Futhermore, Bosk hired McCorkle after he caused a strike protesting the Lansing discharge. In addition, Steve Lansing, who with McCorkle gave testimony against Respondent in 1977, was one of the first painters hired by Respondent in March 1981. I therefore find that any inference of Respondent having engaged in a refusal to hire McCorkle in 1981 based on his 1977 Board testimony was effectively rebutted. Thus to the extent that the complaint alleges that McCorkle's 1977 testimony adverse to Respondent was an effective element in Respondent's discriminatory motive, I would recommend to the Board that the preponderance of credible evidence is to the contrary and that the complaint allegation of Respondent violating Section 8(a)(4) of the Act, in that regard, be dismissed. *Wright Line*, 251 NLRB 1083 (1980).

2. With regard to Respondent's failure to hire McCorkle commencing in January 1981, as alleged, but particularly in March 1981 when Respondent reentered the Chillicothe area to perform painting and sandblasting services at the Mead Corporation job, the General Counsel's case rests principally upon the use of the word "troublemaker" by Foreman Wayne Olsen and its relationship to the circumstances surrounding McCorkle's activities as a business agent for Local No. 605 in the period 1976 through 1980. These activities allegedly so rankled Respondent, and particularly Chenier that, when it had the opportunity not to hire him in March 1981, it refused to do so because McCorkle had historically made so many threats of strikes and caused actual stoppages that it retaliated against McCorkle for such conduct.[7]

There is no evidence in this record, even the inconclusive references by Simpson, a witness whose testimony, I found, was favorable to McCorkle, defining Olsen's use of the word "troublemaker." While I have discredited Simpson's testimony that he heard Olsen use the word on several occasions, it would cause no different conclusion even if Olsen repeatedly used the expression. Respondent's agent with the power to hire and fire, Lawrence Chenier, never used the word. The word was used only by Wayne Olsen, a foreman, who may have had the power to effectively recommend hiring and firing. Chenier said that Olsen, who had the power to effectively recommend hiring, and Respondent, provided with the opportunity to rebut that conclusion by Chenier, failed to use such opportunity. In any event, Olsen was not called to testify in support of Chenier's testimony that Olsen never used the word "troublemaker" and Respondent failed to advance a reason for Olsen's absence. In these circumstances, I have credited Simpson, and find that in March 1981, at a conversation at which Simpson was present and to which he testified, Wayne Olsen said that McCorkle was lazy, a "troublemaker," that there was "no way" that he would be hired on the job, and that Olsen would quit rather than work with him if Chenier hired McCorkle.

3. With regard to the evidence supporting the General Counsel's allegation that it was McCorkle's activities as the Local No. 605 business agent which caused Respondent not to hire McCorkle in March 1981, there is essentially only this Simpson testimony that, in March 1981, Foreman Olsen, in the presence of Chenier, called McCorkle a "troublemaker." In the absence of Olsen, I have credited Simpson and discredited Chenier with regard to the conversation and have found, according to Simpson's testimony, not only that Olsen called McCorkle "lazy" and a "troublemaker" but also threatened to quit if he were hired.

I conclude on the basis of the above testimony, however, that the General Counsel failed to prove a *prima facie* case.

In the first place, only Chenier was doing the hiring. Olsen used the word "troublemaker," not Chenier. There is no proof that, by action or inaction, Chenier adopted Olsen's expression. Chenier's "smile," in response to Olsen's statement, including his threat to quit, is too ambiguous to show Chenier adopted Olsen's sentiments.

Secondly, assuming Olsen's statement in some way binds Chenier, there is no proof that "troublemaker" means "union troublemaker," notwithstanding, as the General Counsel notes, the Board, on occasion, has recognized "troublemaker" as a code word for "union troublemaker," *Huntington Hospital*, 218 NLRB 51, 57 (1975). Olsen's description, on this record, could well be derived from the alleged failure of McCorkle to repay Olsen for the $100 loan, McCorkle's absenteeism even, or McCorkle's improper failure to turn over union funds upon the 1980 merger. In context, therefore, although subject to a possible suspicious meaning, "troublemaker," as an Olsen description epithet for McCorkle, does not necessarily mean or include McCorkle's zealous contract enforcement against Respondent or similar union activity. Thus,

[7] Since Respondent did not urge the theory that, granting, *arguendo*, the credibility of McCorkle with regard to his activities as business agent in calling strikes and threatening strikes, McCorkle's conduct stemmed largely from Respondent's hiring nonunion employees; and that McCorkle (on behalf of Local No. 605), regardless of the lawful terms of the collective-bargaining agreement, was thus enforcing *closed shop* conditions on Respondent and was therefore not engaged in *protected activities*, I refrain from pursuing that line of analysis. It would seem, however, that if Respondent refused to hire McCorkle because it was retaliating against him for his engaging in *unprotected* concerted activities against it over a period of years, there would be a substantial question as to whether Respondent was motivated by unlawful considerations and whether Olsen's use of the word "troublemaker," even if not a declaration of personal animus, referred to such unprotected activities.

I conclude that, in the instant context, "troublemaker" is ambiguous and not sufficiently anchored in the evidence to support an unlawful inference; and that there is no preponderance of credible evidence demonstrating that Chenier, even if he acted on Olsen's outburst against McCorkle, refused to hire McCorkle because of McCorkle's union activities rather than on Olsen's personal dislike (and threat to quit) based on the alleged debt or McCorkle's failure to pay funds to the Union. Moreover, independently, Chenier had discharged McCorkle for absenteeism and was forced or induced to rehire him on condition that the absenteeism abate. Thus, Chenier had had prior sour experience with McCorkle as an employee apart from McCorkle's union activities.

Chenier himself never disclosed any unlawful motive in refusing to hire McCorkle. Olsen, on this record, disclosed no union-based animus of any kind so that his expletive "troublemaker" might be linked thereto. As Respondent points out, a most economically destructive McCorkle action against Respondent was the week-long 1976 strike to protest the unlawful discharge of Louis Lansing. Yet, Respondent thereafter hired McCorkle as a painter while he was the Local No. 605 shop steward. Such hiring hardly supports an inference of retaliatory animus.

Thirdly, assuming *arguendo* that the General Counsel did prove a *prima facie* case, then I would conclude that, pursuant to its *Wright Line*[8] burden to present "persuasive evidence that [McCorkle was not hired] for reasons other than protected activities," *Hillside Bus Corp.*, 262 NLRB 1254 (1982), the evidence persuasively showed that Chenier failed to hire McCorkle because of his own prior experience with McCorkle, especially the 1977 discharge, and Olsen's personal animus against him together with Olsen's threat to quit if Chenier hired McCorkle; and the General Counsel, in its turn, failed to show that Olsen's personal animus was trivial, false, or pretextual. *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

The prime difficulty in this case is McCorkle's incredibility as a witness. At many turns, he either contradicted his contemporary oral and prior written testimony. Even without evidence of his criminal conviction, my observation of him as he testified and my review of the transcript showed him to be generally unworthy of belief.

In ultimately resolving the meaning, in this case, of the inferences to be attached to Olsen's use of "troublemaker," I was particularly impressed by McCorkle's failure to personally apply for employment before Chenier and Olsen. Even assuming, *arguendo*, Simpson's testimony that Chenier had turned McCorkle down for employment on several previous occasions and that Olsen called him a "troublemaker," I would conclude that, in 1981, McCorkle used Simpson to approach Chenier—rather then appear himself for employment, not because of his fear of rejection based on his prior activities as Local No. 605 business agent (including strict contract enforcement), but because of his unwillingness to face Olsen's personal animosity based primarily on the alleged failure to repay Olsen the borrowed money. McCorkle's prior discharge for unexcused absences from the job and Olsen's belief that McCorkle was "lazy" are additional supports of Olsen's animus not derived from McCorkle's protected activities. Compare: *Pfizer, Inc.*, 245 NLRB 52 (1979), enforcement denied 629 F.2d 1272 (7th Cir. 1980).

In short, the General Counsel failed to prove by a preponderance of the credible evidence that Respondent's motive in failing to hire McCorkle was unlawful.

Under these circumstances, I need not reach or decide Respondent's alternative defense—that it hired only from a list of members referred by Local No. 1275 and, since McCorkle was not so referred, he was not hired.

I therefore, issue the following recommended:

ORDER[9]

The complaint be dismissed in its entirety.

[8] *Wright Line, supra*, 251 NLRB 1083.

[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.